

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte JOHN F. TURPIN, AMY POWELL and  
STEPHEN D. FOLLETT

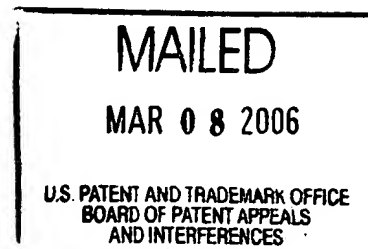
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Appeal No. 2006-0002  
Application 09/935,531

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ON BRIEF

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Before RUGGIERO, BLANKENSHIP and NAPPI, Administrative Patent Judges.

RUGGIERO, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal from the final rejection of claims 1-3. Claims 4-9 have been allowed by the Examiner.

The claimed invention relates to an activity display for multiple data channels of a communication link in which a quasi-three-dimensional graphics display is provided. The display includes time periods as a first axis and data channels

as a second axis orthogonal to the first axis. More particularly, a shading is provided within the rectangles defined by the time periods and data channels representation, which shading represents an indication of the "one's density" for a particular channel during a particular time period.

Representative claim 1 is reproduced as follows:

1. An activity display for multiple data channels of a communication link over a period of time comprising a quasi-three-dimensional graphics display having time periods as a first axis, data channels as a second axis orthogonal to the first axis, and a shade within each rectangle defined by the time periods and data channels corresponding to a one's density for the data in the respective data channels during the respective time periods.

The Examiner relies on the following prior art:

Smith et al. (Smith)	4,870,348	Sep. 26, 1989
Thong	5,241,302	Aug. 31, 1993

Claims 1-3, all of the appealed claims, stand finally rejected under 35 U.S.C. § 103(a) as being unpatentable over Smith in view of Thong.

Rather than reiterate the arguments of Appellants and the Examiner, reference is made to the Brief (filed April 22, 2004) and Answer (mailed March 21, 2005) for the respective details.

#### OPINION

We have carefully considered the subject matter on appeal, the rejection advanced by the Examiner, the arguments in support

of the rejection, and the evidence of obviousness relied upon by the Examiner as support for the rejection. We have, likewise, reviewed and taken into consideration, in reaching our decision, Appellants' arguments set forth in the Brief along with the Examiner's rationale in support of the rejection and arguments in rebuttal set forth in the Examiner's Answer.

It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the obviousness of the invention as set forth in claims 1-3. Accordingly, we affirm.

At the outset, we note that Appellants, at page 2 of the Brief, indicate that appealed claims 1-3 stand or fall together as a group. Consistent with this indication, Appellants' arguments in response to the Examiner's rejection are directed solely to the features present in independent claim 1. Accordingly, we will select claim 1 as the representative claim for appealed claims 1-3 and claims 2 and 3 will stand or fall with claim 1. Note In re King, 801 F.2d 1324, 1325, 231 USPQ 136, 137 (Fed. Cir. 1986); In re Sernaker, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed. Cir. 1983). Only those arguments actually made by Appellants have been considered in this decision.

Arguments which Appellants could have made but chose not to make in the Brief have not been considered and are deemed to be waived [see 37 CFR § 41.37(c)(1)(vii)].

As a general proposition in an appeal involving a rejection under 35 U.S.C. § 103, an Examiner is under a burden to make out a prima facie case of obviousness. If that burden is met, the burden of going forward then shifts to Appellants to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

With respect to representative independent claim 1, Appellants' arguments in response to the Examiner's 35 U.S.C. § 103(a) rejection assert a failure to establish a prima facie case of obviousness since all of the claimed limitations are not taught or suggested by the applied prior art references. In particular, Appellants contend (Brief, pages 3 and 4) that the display resulting from the Examiner's proposed combination of

Smith and Thong would not provide an indication of channel activity of a communication link as claimed. In a related argument (id., at 4), Appellants assert that neither Smith nor Thong disclose a "time versus time" display in which data channels or time slots are displayed along an axis orthogonal to a time axis.

After reviewing the Smith and Thong references in light of the arguments of record, we find no error in the Examiner's stated position (Answer, page 6) which concludes that the frequency span displayed in Smith along an axis orthogonal to the displayed time axis corresponds to the claimed data channel display. We agree with the Examiner that, contrary to Appellants' contention, data channels are not necessarily defined by time slots, but, rather, would also be recognized by the ordinarily skilled artisan as encompassing frequency bands such as would be defined by specified widths in the frequency span along the horizontal axis in the display of Smith. Also, as pointed out by the Examiner, there is no language in claim 1 which limits the claimed data channels to "time slots." In our view, Appellants' arguments improperly attempt to narrow the scope of the claim by implicitly adding disclosed limitations which have no basis in the claim. See In re Morris, 127 F.3d

1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997).

We also agree with the Examiner, for all of the articulated reasons (Answer, page 3), that the shaded rectangles in the display resulting from the combination of Smith and Thong provide an indication of channel activity as claimed. As alluded to by the Examiner, at the very least the spectrum analyzer of Smith, which compares certain bands of frequencies, i.e., data channels, to indicate changes in a signal over a period of time, would provide, in our view, a clear disclosure of channel activity as claimed.

Further, while we do not necessarily agree with the Examiner's attempt (Answer, page 8) to establish correspondence between Smith's displayed "duty cycle" and the claimed "one's density" data representation, we find that the "one's density" limitation is merely a description of the data content represented by the displayed shaded rectangle. As such, we consider such data content representation to be nonfunctional descriptive material which is entitled to no patentable weight since nonfunctional descriptive material cannot distinguish an invention from the prior art in terms of patentability. In re Ngai, 367 F.3d 1336, 1339, 70 USPQ2d 1862, 1864 (Fed. Cir. 2004). Cf. In re Gulack, 703 F.2d 1381, 1385, 217 USPQ 401, 404 (Fed.

Cir. 1983) (when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability).

In the present factual situation, we find no claimed functionality between the claimed "one's density" representation and any underlying display structure. Similar to the reasoning applied by the court in Ngai, the data content of what is displayed on the claimed display is not dependent on whatever structure may be ascribed to the display, nor is any such display structure dependent on what is being displayed.<sup>1</sup>

With the above discussion in mind, it is our opinion that the Examiner's proposed combination of Smith and Thong satisfies

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<sup>1</sup> We make the observation that the subject matter set forth in the claimed "activity display" is directed to a data compilation which is output in the descriptive form of a three-dimensional graph. As we found in our above discussion, such displayed information is nonfunctional descriptive matter since it is not functionally related to any underlying display structure. As such, it is not readily apparent as to which of the four classes of statutory subject matter enumerated in 35 U.S.C. § 101 such subject matter would fall since such "nonfunctional descriptive material" is not a process, machine, manufacture, or composition of matter. It is noteworthy that Appellants, at page 4 of the Brief, characterize their invention as a "time versus time graph."

Although the format of claims 1-3 would seem to raise a question as to whether such claims set forth statutory subject matter under 35 U.S.C. § 101, we have no such rejection before us, and we therefore decline to rule on the merits of any such rejection. In any further prosecution in this application, however, the Examiner should consider the applicability of a 35 U.S.C. § 101 non-statutory subject matter rejection, taking into consideration the recently published "Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility," 1300 Off. Gaz. Pat. and TM Office, No. 4 (November 22, 2005).

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all of the requirements of representative claim 1. In other words, the resultant combination produces an orthogonal axis time and data channel display with shaded rectangles which indicate channel activity.

For the above reasons, since it is our opinion that the Examiner's proposed combination of Smith and Thong satisfies all of the claimed limitations, the Examiner has established a prima facie case of obviousness which has not been overcome by any convincing arguments from Appellants. Accordingly, the Examiner's 35 U.S.C. § 103(a) rejection of representative independent claim 1, as well as claims 2 and 3 which fall with claim 1, is sustained.

In summary, we have sustained the Examiner's 35 U.S.C. § 103(a) rejection of all of the claims on appeal. Therefore, the decision of the Examiner rejecting claims 1-3 is affirmed.



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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective September 13, 2004).

AFFIRMED

JOSEPH F. RUGGIE

JOSEPH F. RUGGIERO  
Administrative Patent Judge

Howard B. Blakenship

HOWARD B. BLAKENSHIP /  
Administrative Patent Judge

BOARD OF PATENT  
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ROBERT E. NAPPI

Administrative Patent Judge

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